

To: Articles Team
From: [REDACTED]
Date: August 16, 2024
Re: S-22615 – Pre-Arraignment Promise

I. RECOMMENDATION

I strongly recommend we move this piece to C-Read. As you'll see from my pros/cons below, I think this is an extremely strong contender for our journal! It meets many of our priorities – it's essay length, on criminal procedure, and is written by a woman of color who is also a practitioner. It also reminds me a lot of the Chicago teachers piece we were all very excited about in the spring in that it is a slightly unconventional article that draws a lot on personal experiences, but still has a strong legal tie-in. And it cites a Kendrick song in the Conclusion! I believe we should O-Read this piece and, barring any literature review or faculty review concerns, I think this is an extremely strong last (or second to last?) piece.

II. SYNOPSIS

Please check out [REDACTED] rotopool for an excellent summary of this piece! At a high level, the piece is about the author's experience and the conclusions of a Santa Clara study where people were given access to public defenders prior to arraignment. The conclusions of the study were that this helped outcomes in many cases and generally was a positive experience for these people. The author also posits that more public defenders offices should do this, especially as it could help alter both prongs of the *Strickland* test for right to counsel by changing norms.

III. ANALYSIS

a. POSITIVES

Writing Style/Structure: I found the writing style to be extremely accessible. The author did a good job of both laying out the stakes in a personal way, but also setting a helpful framework for criminal procedure law. I think this is in the top tier of readability and genuinely I enjoyed reading the entire thing. I think it is also appropriately concise and does not try to artificially make the piece into an article-length one. Instead, it lays out the necessary background, explains the study, and then concludes with some legal takeaways.

Impact: I think this could be a very high impact piece. This study on pre-arraignment counsel feels like an extremely important one, and I think it would be great to draw more attention to it – especially as it seems some other public defender offices nationwide are also experimenting with this approach. Additionally, I really liked the legal call to action at the end, which both felt realistic and set out the stakes for how providing these services could alter norms. In doing so, it could help build a stronger doctrinal movement to push for a pre-arraignment right to counsel.

Our Priorities: As I laid out above, this meets a lot of our priorities! The author is a woman of color who is drawing on her own experiences as a public defender who participated in this program. She also is a clinical faculty member. The piece is on criminal procedure and is essay length – which was exactly what we were looking for!

b. NEGATIVES

Bluebooking: Since a fair amount of this piece does draw on the author's personal experience, there is not a lot of bluebooking or support in those portions of the piece. I don't see this as a major concern, though, and believe we could work with the EEs to figure out a way to either support these claims or accept them as true to the author's experience. This is not the first time we are considering a piece of this nature, so I imagine we would be able to figure something out creatively.

Legal-ness: I imagine the perpetual debate would arise about whether this piece is sufficiently legal. Admittedly the piece doesn't go into doctrine too thoroughly and the final conclusions that do relate to the law are not particularly long. However, I think the focus of the piece on providing counsel is extremely legal. And I think the portions that do go into doctrine are strong and logical. Thus, I do not see this as a major concern – and arguably it is more legal than some other piece we have O-Read this year.

IV. PREEMPTION CHECK

At a quick glance, I do not believe this piece is preempted. It does not seem as though the author has written any other pieces for a legal journal before, so there are no concerns of self-preemption. Given the specific nature of the study, I also do not see preemption being a major concern.

My main focus was on the cited economics piece that lays out the study itself.¹ This piece is quite short and in my opinion does not preempt the current one in any serious way. It is not written by lawyers so does not go in depth into the doctrine of criminal procedure or the legal implications of these outcomes. Instead, the focus of this piece is almost entirely on the methodology of the study and the numerical analysis. It also does not include any personal anecdotes or an account of the experiences of the defendants. From my read of both pieces, they seem to barely overlap outside of the cited numerical results and the general topic of this study. In some ways, this feels like the best of both worlds where we get to publish a cutting-edge legal piece without having to worry about the data analysis ourselves.

¹ Johanna Lacoë, Brett Fischer & Steven Raphael, *The Effect of Pre-Arrest Legal Representation on Criminal Case Outcomes* 2 (Nat'l Bureau of Econ. Rsrch., Working Paper No. 31289, 2023).